

REVIEWS

THE LOYALTY OF FREE MEN. By Alan Barth, with a foreword by Zechariah Chafee Jr., New York: The Viking Press, Inc. Pp. xxxi, 253. \$3.00.

SOME three hundred years ago John Milton formulated the classic battle plan for the literary defense of civil liberties. Writing on a contemporary loyalty problem, he "laid out" his thoughts to show first that the instigators of that program "be those whom ye will be loth to own," next that the program "avails nothing," and "last that it will be primely to the discouragement of all learning, and the stop of Truth, not only by disexercising and blunting our abilities in what we know already, but by binding and cropping the discovery that might be yet further made." With somewhat less of rhetorical finish, though with somewhat more of such modern virtues as factual reporting, Mr. Alan Barth in his recent book "The Loyalty of Free Men" follows the Miltonic pattern. Mr. Barth discusses first the aims of the instigators, the "Americanists," who have promoted the current "cult of loyalty." Next he shows that the cult and its engines are powerless to cope with real problems of national security, and last that these engines are antithetical to native tradition, and, partly as a result of that antithesis, are positive handicaps to the achievement of national strength.

With respect to the first proposition, Mr. Barth indicates that concern with loyalty has become an American obsession. In areas where the very concept is irrelevant it is applied as a decisive principle. By its extremely imprecise terms, motion pictures, concerts, and lectures are cancelled, actresses, clerks, and teachers dismissed, stores boycotted. Behind these occasionally tragic outbreaks of organized silliness lies the cult of loyalty: a pretense or belief that loyalty, like a college cheer, can be whipped up by frenzied exhortation. The whippers, of course, are the "Americanists" whom Mr. Barth with perhaps excessive circumspection criticizes for their brains rather than their motives. The "Americanists," he writes, fail to see that loyalty "like love must be freely given. It can be evoked but it cannot be commanded or coerced." The loyalty of free men, moreover, is a specially delicate matter, particularly unresponsive to flagellation, being not more fragile but more spontaneous than other loyalties in that it is given not so much to a government as to those principles for which a government is created. Since those principles, the principles of freedom, which attract the loyalty of free men, are attacked by the "Americanists," their failure to recognize that the loyalty of free men is not amenable to high-pressure stimulation is in itself a form of disloyalty detrimental to the principled adherence traditionally accorded the United States by its citizens.

Furthermore, postponing for a moment the record of their attack on freedom, the "Americanists," in Milton's words, avail nothing. They have not achieved and give no promise of achieving their professed goal, liquidation of the Communist menace. The Communists, Mr. Barth asserts, are a new ele-

ment in American politics. Fully controlled by a foreign aggressive power and unconditionally opposed to American traditions of "self-government and individual responsibility," they are enemies of the United States. "To recognize them as enemies, however, is not to acknowledge that they gravely imperil the nation." On the contrary, judged by their present strength, which is not (the point is self-evident but in the light of recent estimates needs repeated assertion) to be confused with their past strength, they are a minor nuisance requiring ordinary precautions rather than a national emergency. Mr. Barth contends that the Communists, "Americanist" estimates notwithstanding, could not conceivably stage a revolution or even affect a serious industrial stoppage. In addition, just as their assessment of Communist strength is false, so the "Americanist" method for taming the Communist beast is improper. Communist infiltration into industrial unions, for example, could represent a grave danger. But such danger can best be countered not by the Communist provisions of the Taft-Hartley act (witness the case of Ben Gold who officially, and that is all, withdrew from the Party in order to comply with the provisions of the Act) but by "voluntary democratic action within the American labor movement." With respect to the danger of the Communist ideology, no legal safeguard can be erected. "Danger" is in fact too harsh a word, for as the record shows, almost every feature of American life conspires to resist a doctrine which even in its palmy days had painfully slow going. As Mr. Barth observes, "The most potent defense against the beliefs of the Communists is an outweighing affirmative belief in the superiority—and the superior appeal—of American institutions." Espionage and sabotage are, to be sure, definite threats, but both are adequately covered by existing counter-intelligence agencies of the Federal government. In short, within the existing framework of American society there is intelligence enough to resist the Communists and machinery adequate to their control. All the efforts, time, and money so far spent by the "Americanists" in their struggle against Communism come down to this: a problem already under control has been blown up into a menace by people powerless to deal with the menace should it ever exist.

The bloating of one member, however, disorders the whole body. Incident to the distortion of Communism, there arise complications, and the pound of cure becomes a ton of disease. Mr. Barth assembles a great mass of hitherto diffused material to chart the spread and depth of the resultant infections whose poison is not everywhere the same. First, there is the extra-legal attack waged by the Committee on Unamerican Activities, and by its mimics in the various states, upon all forms of political heterodoxy. These committees, operating under indefinite mandates over infinitely elastic terrain, systematically avoid judicial review and make little effort at legislation. Their weapon, punishment by publicity, is one that defies defense, and this punishment, given the broad scope of committee activities, may be visited upon any person or organization distasteful to committee members. In fact, Mr. Barth shows, punishment tends to follow a more selective pattern. Since it is modernity itself,

new ideas, innovation, reform, and very youth which affront the "Americanist," his natural and irreconcilable enemy has been the greatest regenerative force in recent American history, the New Deal. Committee activity has concentrated on an effort to discredit the reforming wing of the Roosevelt administrations. "From the beginning liberals were the committee's real targets," and strikes were made at those targets over great distances of time and place. Thus Alger Hiss, as Mr. Alistair Cooke has so well shown, was tried in the fifties for a crime committed in the thirties. Similarly, other liberals in every walk of life, in the government and out, were subjected to painful hearings in which they had little opportunity for self-defense, and from which, however heroically successful the defense, they suffered almost certain loss of public standing. Apart from a supererogatory demonstration of the evils of Communism, the main result of these hearings has been to "inspire panic rather than realism. By denouncing liberal individuals and progressive measures as 'Communitic' the committee spread confusion rather than caution. By punishing unorthodox opinion, it put a fetter on expression." Finally, and perhaps most important, it caused the Government of the United States to stand lower in the eyes of many people throughout the world. By inviting all manner of men to come and cry out against their fellows, the committees became a vehicle for the "apotheosis of the informer" thereby drawing to itself the just contempt of all proud men.

In another far more material way the "Americanists" have operated to the detriment of the United States Government. Since 1947 the President's loyalty program, adopted under "Americanist" pressure, has provided for "a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the federal government." Apart from the fact that indiscriminate extension of the loyalty program involves the government in needless expense and in a cumbersome procedure that unnecessarily slows recruitment of personnel for security agencies, there is nothing intrinsically harmful in the program. In actual operation, however, the loyalty program violates many traditions of democratic procedure. First, organizations are placed on the Attorney General's list, without any hearing.¹ Second, in the loyalty hearings themselves evidence

1. Mr. Barth, who wrote without the benefit of the six Supreme Court opinions in the recent case of *Joint Anti-Fascist Refugee Committee v. McGrath*, 19 U. S. L. WEEK 4232 (April 30, 1951), stated this more categorically. Presumably on the basis of the lower court decisions in the *Joint Anti-Fascist* and related cases, he assumed that the Attorney-General's determinations were not subject to challenge in any forum. Since each of the Supreme Court majority wrote his own opinion in reversing that case, precision of holding is not the strongest attribute of the decision. At a minimum, the holding seems to be this: if a listed organization alleges complete purity of organization and activity, plus injury resulting from arbitrary inclusion on the Attorney-General's list, its complaint may not be dismissed for failure to state a cause of action. What the subsequent hearing is to ascertain, and where the burden of proof lies is not clear. Again at a minimum, the Supreme Court decision seems to require a showing that the Attorney-General did not act arbitrarily.

is supplied by the FBI from unidentified sources whose reliability is vouched for only by the FBI.² The prosecuting agency, that is, estimates the value of the evidence adduced.³ Third, in the loyalty hearings the accused is given no opportunity to confront his accuser or to obtain specific data on the charges which, moreover, are not delivered under oath.⁴ Finally, the examination in loyalty hearings knows no bounds, and often involves philosophic inquiry rather than factual determination. Under existing conditions, Mr. Barth observes, the loyalty boards are responsible for the "task of judging inscrutable motives on the basis of imponderable evidence." One unfortunate result of this impossible responsibility is a repetition of the process whereby the United States Government is dragged in the mud. A few people, at least, are unjustly treated. More serious, however, is the development of unwillingness on the part of many able citizens to enter government service, a reluctance which is matched by a disposition on the part of those already in the government, and chary of attracting special attention, to relax into perfunctory performance of tasks which for satisfactory accomplishment require a venturesome spirit of innovation.

A further abuse, also affecting government agencies, which has been promoted by "Americanist" activity has been the growth of the police power. With characteristic restraint, Mr. Barth concentrates on present rather than prospective dangers of the FBI. He is careful to indicate that it is not a Gestapo, and that its chief is not Heinrich Himmler. Nor does he dilute his argument, in the manner of Max Lowenthal, by fragmentary quotation of every adverse opinion. What Mr. Barth has to say is that the FBI has grown from an organization concerned with enforcing federal laws into an intelligence agency making political evaluations. In the process its agents have developed the dirty techniques of all such investigating organizations. They have employed *agents provocateurs*, accumulated large files of secret dossiers, and resorted, despite express prohibition, to wire-tapping. Such being the case, the FBI must be regarded with vigilance, and accordingly the fact that at present it enjoys uncritical esteem is "ominous to the traditions of liberty."

More than ominous has been the effect of the cult of loyalty on scientific endeavor in this country. As Mr. Barth puts it, "The paradox of security frustrated in the name of security is most apparent in relation to scientific inquiry." Following a distinction first drawn in a report of the Joint Com-

2. For an official statement of the FBI investigative and reportorial techniques in loyalty cases, however, see Hoover, *A Comment on the Article "Loyalty Among Government Employees."* 58 YALE L. J. 401 (1949).

3. Mr. Hoover would probably disagree with this. *Id.* at 408.

4. The employee has apparently no right to judicial review of the loyalty board's determination nor to the traditional due process protections. See *Bailey v. Richardson*, 182 F.2d 46 (D. C. Cir. 1950), which was affirmed by an equally divided Supreme Court, 19 U. S. L. WEEK 3296 (1951), on the same day that the *Joint Anti-Fascist* case, *supra* note 1, was decided.

mittee on Atomic Energy, Mr. Barth indicates that there are two types of security: security by achievement, that is by outdistancing the field, and security by concealment. It is Mr. Barth's contention that security by concealment has completely dominated American endeavor in the field of atomic energy, to the cost, in fact, of achievement. Consequently, our actual power in relation to that of other competing countries has been impaired. The rationale for this weakness through secrecy has been sketched at length by Mr. Walter Gellhorn, but Mr. Barth's brief summary is nevertheless useful. He finds that since scientific progress depends upon what Dr. J. Robert Oppenheimer has called the "gossip of scientists who get together," it is directly, and in the nature of the case immeasurably, impeded by limitations on gossip. To an extent that is indeterminable precisely because it involves possible but as yet unaccomplished exploitation, the prohibition of the free exchange of ideas stops the full development of scientific knowledge. Moreover, the fact that such prohibitions exist cramps recruitment and training of personnel for future scientific work. On the one hand, scientists are unwilling to enter fields where their activities are so thoroughly limited, and where the possibility of gaining professional renown through publication is closed off. On the other hand, the absence of complete information stunts the growth of those scientists now in schools who have no access to the latest findings. Their capacity to increase our scientific knowledge is by so much reduced. Bound and cropped indeed as Milton said is "the discovery that might be yet further made." In addition, the extreme control of information denies to the public knowledge of facts indispensable for intelligent policy decisions on atomic energy problems. If, for example, atomic scientists had been able to speak freely, some glib certainties with respect to the hydrogen bomb would not have passed unchallenged, and a different policy might well have evolved. Thanks, however, to the ban on information, important public decisions are taken in utter darkness, and the informed are at the mercy of the ignorant.

A similar subjugation of the informed to the ignorant has been committed in the field of university education where political orthodoxy as judged by regents or politicians has been made a test of competence. It is difficult to estimate actual harm done by the extension of loyalty investigations to the campus. Universities have had thrust upon them an ignoble investigatory role, and professors have been obliged to take an oath which in principle, as it is not demanded of their peers in other professions, impugns their loyalty, and which, moreover, exposes colleagues, whose principles they may respect, to punitive action. As a result many individuals have already been hurt. In some institutions, *e.g.*, the University of California, the quality of the instruction will almost certainly decline. Yet even these, possibly slight, losses are uncompensated by any gain, are on balance unnecessary, a price paid for no good. For freedom, the price which is paid, is, as Mr. Barth finally concludes, itself a useful item. It is not a luxury to be enjoyed during rest periods

when national security is safe and sound. It is not to be thrown aside as a weakening, divisive principle intolerable in times of stress. Rather it is a positive source of incalculable strength, a weapon no enemy can match, a gun only native forces can spike.

In the statement and demonstration of this argument for the utility of freedom lies the main utility of Mr. Barth's book. A subsidiary virtue is his assembly of the great variety of relevant cases and incidents which compose the stuff of our loyalty problem. Nowhere else are so many examples brought together. In few places are complex issues analyzed with such inclusive thoroughness, and knotty stories unraveled with such clarity of narrative presentation. The persistent calm of analysis and balance of judgment translate Mr. Barth's high purport, and only by reluctance to explore deeply the material and psychological roots of the "cult of loyalty" does Mr. Barth slight his subject. In one other respect, perhaps, he misses the mark. A personnel program based on big business and O. S. S. hiring techniques which Mr. Barth presents as an alternative to the President's Loyalty Program is too scantily outlined to admit serious consideration. Otherwise, however, he gives what he promises, and that on the highest plane. At no time does he allow the tone and passion of the argument to be vulgarized by concessions to utility. He is not for freedom only because he can "get" something for it. He goes beyond calculation to assert freedom's independent value, thereby pressing home the need to fight now on an easily defensible line instead of later when, with utility gone, the defense of freedom will rest on the sickly heroism of enthusiasm for a lost cause, worth defending by virtue of being unpopular and doomed, something to die for. The freedom that Mr. Barth is talking about is something to live with.

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NICHOLS', *THE LAW OF EMINENT DOMAIN, THIRD EDITION*. By Julius L. Sackman, and Russel D. Van Brunt. 1950 Matthew Bender & Co. (1950) Volumes 1, 2 and 3.

ALTHOUGH there have been more public improvements in established areas of public undertakings and greater development of new areas of public activity¹ requiring compulsory land acquisition in the past thirty years than at any time in our history, no new work on eminent domain or a revision of an older work has been published during this period. There is a real need for a scholarly and comprehensive work to take stock of the changing attitudes

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1. See, *e.g.*, *People of Puerto Rico v. Eastern Sugar Associates*, 156 F. 2d 316 (1st Cir., 1946), *cert. denied*, 329 U. S. 772 (1946), upholding use of the condemning power to redistribute farm land from large absentee corporate farmers to small individual farmers.

of courts toward the power of eminent domain which has occurred during this period of tremendous growth in government. The first three volumes of a contemplated six-volume revision of Nichols' standard treatise on the law of eminent domain have now been published for the purpose of filling this need.

These three volumes contain Parts 1, 2 and 3 of a contemplated seven-part treatise. Part 1, entitled "Introduction and Jurisdiction" treats with the historical development of the power of eminent domain and the jurisdiction to condemn and the capacity of the condemnor. Part 2, entitled "Constitutional Rights and Limitations" describes the limitations on condemnation imposed by the due process clause and other clauses of federal and state constitutions; considers the "property rights" which must be condemned or at least considered in condemnation proceedings; points out the difference between taking and damage; and closes with a list of points which have been made in judicial opinions with respect to the meaning of "public use" in the requirement that condemnation must be for a public use. Part 3, entitled "Title Acquired and Servitudes Thereon" considers what title and interest the condemning authority acquires when it condemns for a particular use. Part 4, on Valuation and Damages, Part 5, on Procedure, and Part 7, on Remedies of Owner, will be published at a later date in Volumes 4, 5 and 6.

While the later volumes covering areas of law in which the revisers practice² may put their conception of the purpose of this revision in better light, the first three volumes appear to be primarily a revision of the footnotes of the earlier editions of this work by bringing the case listings up-to-date. The textual material, oddly enough, fails to take cognizance of the changes in attitude of courts toward legislative enactment and the limitations on judicial review of exercise of the condemning power. A revision of a work published more than thirty years ago,³ particularly when the work covers an ever expanding and changing subject, must be judged as if it were an original work and not solely as a revision. Against this standard I find this treatise badly conceived.

What is the function of a treatise? One function is, of course, to serve as a bibliography both of ideas and material in support thereof. This revision serves this end poorly. The publishers have committed the unpardonable sin of failing to date the cases and the revisers have seen fit to ignore all of the analytical literature on eminent domain which has been published since the previous revision of this work. I once found in this revision a reference to a law review,⁴ but it came from an earlier edition. The wealth of literature which the Index to Legal Periodicals discloses is not only not cited in this

2. Sackman is Title Attorney for the Law Department of the State of New York and Van Brunt is Assistant Attorney General in Charge of Bureau of Rights of Way, Law Department of the State of New York.

3. The first edition of NICHOLS appeared in 1909 and the second in 1917.

4. It was Volume 17 of HARVARD LAW REVIEW (1903).

work, but the text quite clearly indicates that the authors are not cognizant of the contributions which this literature has made to thinking about the subject.⁵

If the only function of a treatise is to serve as a "case lister" or "idea catalogue," the treatise cannot be classified as a work which contributes to legal scholarship and legal thought and analysis; it belongs in the category of a digest, a list of words and phrases or an annotation. Not only does such a treatise not contribute to legal scholarship, but I doubt that it has any reason to be published except the publishers' pressure to have books to sell. If one judges by the great treatises of the past—Coke, Blackstone, Kent and the more modern Williston and Wigmore treatises—the sound objective of a treatise is to inject a guiding principle into the subject or to attempt to analyse the existing thinking and to classify the case material in terms of guiding principles or objectives of the law. Once such a principle is asserted or deduced it can then be applied to any fact situation by the authors or lawyers for solution of as yet undecided matters. The author, accordingly, uses the particular as illustrations of application of the general and he rejects as unsound that which he cannot explain within his theory or principle. Regardless of the judgment which the reader forms as to the soundness of theory or thoroughness of research of such works, these works were contributions to legal thought and scholarship; they were examples of creative thinking; they aided the lawyer in analysing and thinking through his case.

Publishers witnessing the financial success of these treatises have apparently come to the conclusion that the success of these works lies in their size and in the collection of cases and ideas (rational or irrational) which a lawyer without need of analysis can quickly seize upon to support a position of his client. Accordingly, we have each year more and more books published that are "case listers" or "argument supporters" which are mammoth in size and consist mainly of a catalogue of arguments or comments which have been made over the years on almost any position imaginable.⁶ Size is produced by particularization of points, which are set forth not as illustrations or application of principle but as separate and independent categories. Thus, in the present work, we have separate classes on the power to condemn for highways and for bridges, for elevated railways and for subways, for railroads and for airplanes, and for each kind of public utility. I expect any day to see a work published which is so particular that it rejects a classification of public use

5. From October 1934 to July 1950, the Index to Legal Periodicals lists more than 60 articles and student notes on eminent domain and more than 150 case comments. Two excellent law review comments showing the changed attitude of courts toward "public use" are, McDougal and Mueller, *Public Purpose in Public Housing: An Anachronism Reburied*, 52 YALE L. J. 42 (1942) and Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L. J. 599 (1949).

6. The publishers of the present work have several scholarly jobs to their credit. Among them are RABKIN AND JOHNSON, *FEDERAL INCOME, GIFT AND ESTATE TAXATION* (1942) and POWELL, *THE LAW OF REAL PROPERTY* (1949).

into such "broad" categories as "elevated railways" and "subways" and which insists that the proper classification is that of the public use problems of the New York Elevated Company on the one hand and the public use problems of the Eighth Avenue subway system on the other.

In my opinion, this revision of Nichols falls within the case listing category of treatise and not within the category which analyses and classifies material on the basis of principle and theory. As an illustration of the limited objective of this work, I have selected Chapter 7 on "public use", although it appears to me to be typical of the whole work published to date. In this chapter, we are told that there is a disagreement over the meaning of the term "public use"; that there is a "narrow view" which finds "public use" to mean "use by the public" and a "broad view" which says public use means "public advantage." The authors thereupon cite cases in support of each of these theories. Fifteen of the twenty-nine states whose case law is cited in support of the narrow view are also included in the list of states whose cases are cited in support of the broad view. With the cases undated, and the authors uncritical, it is almost impossible for the reader to make a judgment for himself on the trend in resolving this dispute. Even in their own jurisdiction, New York, the revisers do not seem to attach any significance to the fact that the New York cases cited in support of the narrow view are from Volumes 66 to 135⁷ New York while the New York cases cited for the broad view are from Volumes 212 to 270.⁸

We do get a comment by the authors or revisers on these two views. It is said that the cases which lend support to the narrow view are "numerous and weighty" but "weakened by the erroneous conception of the relation of the courts and legislation." Subsequently, we are told, however, that "neither of the two *extreme* views" (*italics supplied*) "holds good when one is applied to all concrete cases" and "neither can be accepted as the true one without disregarding some of the well-established doctrines of this branch of the law." Any attempt to establish a sound principle is dismissed as unrewarding although it is admitted that this must "grate on logical minds" and the balance of the chapter consists of an itemization of the various purposes for which condemnation has been upheld. The most in the way of generalization that is attempted is to "define" the term "public use" by listing all of the instances where condemnation has been allowed. No statement of a principle to be applied in the future is attempted. Contrast the hesitance of these practicing lawyers with the firmness of Professors Williston and Wigmore in taking positions and in facing the consequences of their theories.

The weakness of this revision stems in part from the fact that the publishers (or the revisers themselves) have conceived the job of revision to be nothing more than that of bringing the footnote citations up-to-date. The confusion which this produces can be seen in the material on review of state condemna-

7. From 1876 to 1892.

8. From 1914 to 1936.

tion proceedings by the United States Supreme Court. Almost from the time the second edition was published, certainly since the 1930's, the United States Supreme Court has, with relative consistency, exhibited a hands-off policy with respect to state determination of the purposes for which it wishes to condemn.⁹ As a consequence, there are no later cases since those cited in the earlier editions, there is just changed court attitude. The text and the undated footnote cases cited from Volumes 96 U. S. to 228 U. S.,¹⁰ therefore, convey the impression that the Supreme Court in 1950 is in the habit of using the 14th Amendment to maintain a firm control over the purpose for which a state may condemn!

The power of eminent domain is only one of the three great powers of government. The other two, the taxing power and the police power, have been subjected in recent years to searching analysis and thinking in the current legal literature. However, there are no comprehensive modern treatises covering these two powers; we still need such a treatise on the condemnation power.

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COMPARATIVE LAW CASES AND MATERIALS. By Rudolph B. Schlesinger. Brooklyn: The Foundation Press, Inc., 1950. Pp. xxxiv, 552. \$7.50.

THE first printed casebook on comparative law is an event. While courses in comparative law are now given in many law schools, the materials used have heretofore been available for use elsewhere only in mimeographed form. They have also lacked teaching aids which could guide the uninitiated in their use. Rudolph Schlesinger, who teaches comparative law at the Cornell University Law School, has filled the gap with voluminous materials and bibliography and teaching aids in the form of questions to be asked of the materials at each appropriate transition point. A course in comparative law could now be developed by an able teacher of the common law even if he had had no opportunity to study law abroad. Likewise a practitioner who first meets a problem of foreign law in practice can select this volume with the reasonable expectation of finding a place to begin his research.

Schlesinger seems to have two goals in mind (a) interesting the prospective American student by playing upon his penchant for practical subjects, and (b) intriguing the student who has been interested to dwell thoughtfully upon the fundamental principles of law and legal institutions. Both of these aims are usually present in the minds of those who teach comparative law. Usually they are present in reverse emphasis to that given by Schlesinger, who has given more space to proving the practicality of the subject than to matters of jurisprudential value.

9. See discussion of the point in Comment, *supra* note 5, at 608 *et seq.*

10. From 1877 to 1912.

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The practical value of a study of foreign law is demonstrated in the volume by copious use of case materials concerning such problems as pleading and proof of foreign law, examination of expert witnesses, finding the law and comprehending the vague term "civil law." No reader can leave this part of the book without an uneasy feeling that his education for practice in a large city would be incomplete without comprehension of these points. Some teachers may think that these features should be treated in the usual courses on civil procedure and evidence, but the fact is that they rarely are so treated, and Professor Schlesinger has provided a convenient source book for those who need to explore the problems.

The same may be said for the truly extraordinary bibliography of seventy-one pages, arranged in accordance with subject matter and providing the most convenient access to English language law review articles on foreign law yet to appear. Because of the bibliography and the practical material referred to, every law office introducing recently arrived graduates to the mysteries of practice in a polyglot city will probably want access to the volume.

No two teachers of comparative law conceive of the subject in the same terms. No two use the same materials, usually because their personal experiences have varied. For such reasons disagreement can be expected over Professor Schlesinger's selection of materials on substantive law. He relies upon private law rather than public, and treats particularly the law of contracts, agency, corporations, and conflict of laws. He explains that private law is more teachable than public because it is less changing, while the subjects chosen are of particular importance to the practitioner serving American and foreign businessmen.

No one will deny that the subjects chosen have the value indicated, but there will assuredly be some who will regret that such emphasis has been placed upon the details of international commerce. Foreign law can be used as a vehicle to raise the great problems of social control through law, the problems of the state and the individual, and the question of values and their protection. For some teachers these questions are exciting precisely because they are in flux. No student is expected to emerge from a course in comparative law as a master of some aspect of foreign law. In consequence, there is no reason to argue that the invocation of thought about the debated and perhaps insoluble questions of our time is not sufficient reason for a course in comparative law.

Now that the practical features of a course on comparative law are set forth most convincingly, together with a valuable compendium of information on the civil law and its institutions, Professor Schlesinger might prepare a supplementary volume demonstrating the other potentialities of a course in comparative law in legal education. These other potentialities are not without considerable merit.

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A CATALOGUE OF THE LIBRARY OF SIR EDWARD COKE. Edited by W. O. Hassall, Bodleian Library, Librarian at Holkham. With a Preface by Samuel E. Thorne. Yale Law Library Publications. No. 12. October, 1950. Pp. viii, 98. \$2.00.

THE publication of a catalogue of the library of Sir Edward Coke is a matter of considerable interest to students of the great Chief Justice and his writings. His books were the tools of his trade, the materials with which he labored; and hence to know what books comprised his library and to learn something of how he used them is to gain a better understanding of the man himself. A sufficient number of his books and manuscripts still remain in the house of his descendants at Holkham in Norfolk to show that he possessed a very remarkable collection. But in the past it has been difficult to obtain a true picture of what his library comprised in his own day. There has been the problem of separating his books from those of his descendant Thomas Coke, Lord Lovell and later earl of Leicester, who in the early 18th century purchased rare books and manuscripts on a princely scale. A second difficulty has been that many books and manuscripts, especially the latter, known or thought to have belonged to Sir Edward Coke have gone astray and are not to be found at Holkham. Some are in other libraries, some lost altogether. His own catalogue offers a clue to the solution of these questions and adds many items of which heretofore there was no knowledge. The catalogue, indeed, is not complete, and some of his books and manuscripts are strangely absent from it. It provides nonetheless a very fair idea of what his library contained.

The catalogue is published from a manuscript at Holkham written shortly before Coke's death in 1634. It is not in Coke's hand, but his initials appear at various places in the margin as though he had supervised the work. Mr. W. O. Hassall, the present librarian at Holkham, has done the editing with scholarly care and judiciousness; and Professor Thorne has added a short but excellent preface.

A striking feature of the catalogue is the large number of books on non-legal subjects. The first section into which the catalogue is divided contains a long list of books on divinity, perhaps a fourth of the entire library. There are Bibles, books of devotion, religious works of medieval and modern times, and quantities of the controversial theological literature, half religious and half political, of the 16th and early 17th centuries. One is left with the impression that Coke's hatred of Roman Catholicism, though certainly partaking of the fanaticism of the time, was based in part upon reading and not upon prejudice alone. Coke places his books on the laws of England in the second section of his catalogue because, he says, they are derived from the laws of God.¹ Here is the heart of the library, and I shall return to it presently. A third section lists books on the civil law and a fourth lists books on history, "forasmuch as approved histories are necessary for a iurisconsult—for hee that hath redd

1. P. 22.

them seemed to have lived in those former ages."² The section on history is very strong and indicates the high value placed by Coke upon historical studies as assistants to the study of law. Shorter sections follow under various headings: philosophy, rhetoric, and grammar, science, poetry (which is weak), dictionaries,³ "Bookes de Republica" or political theory, heraldry and pedigrees, cosmography, mathematics, trade, war, and a miscellany of tracts and discourses. It is an imposing list.

For a man to own a book does not mean that he has read it or read it critically. But the extent and nature of Coke's library and his obvious pride in it offer strong evidence that he devoted considerable time to general reading outside the law; and this supposition is supported by his writings and by his speeches in parliament which are enlivened by constant references to non-legal literature. On the other hand, it must be confessed that Coke did not bring to these more general studies the same critical acumen that he brought to the study of the law. He accepted historical legends with astonishing credulity. Moreover, he was always the advocate, the practical lawyer who grasped instinctively at any and all evidence to prove his point. General studies were "handmaides to the knowledge of lawes;"⁴ they must elucidate the law though they were bent and distorted in the process.⁵

Coke's legal library, as it appears in his catalogue, is extraordinary in size, in quality, and in range. It contains, as one would expect, the ancient texts: Glanvil, Bracton, Fleta, Britton, and standard works such as the Register of Writs and the Mirror of Justices.⁶ There are three printed copies of Littleton, one of them famous as containing Coke's marginalia and interleaved observations;⁷ and there are "two auncient MS: of littleton."⁸ Coke possesses the medieval and Tudor Statutes, some in print and some in manuscript, with abridgements and indices; the Year Books, a great many of them, mostly in print but some in manuscript, with the abridgements of Statham, Fitzherbert, and Brooke;⁹ the printed reports of Plowden and Dyer,¹⁰ and other reports in manuscript. One finds the works of other Tudor lawyers: Staunford,

2. P. 42.

3. There are also collections of quotations and epitomes of knowledge in various fields, of which Coke appears to have been fond.

4. P. 59.

5. W. S. HOLDSWORTH, 5 HISTORY OF ENGLISH LAW 458-9 (London, 1924).

6. Of these items, only Glanvil and the Register of Writs remain at Holkham. Fleta and the Mirror of Justices are listed as manuscripts, the others as printed books.

7. This famous copy is now Harleian MS 6687 in the British Museum. It is not Coke's manuscript draft of the First Institute but it contains the notes and comments on which that draft must have been based. The other two copies are at Holkham. But see P. iii, note 2.

8. No. 305 in Coke's catalogue. They are not at Holkham.

9. The printed Statutes and Year Books listed in the catalogue largely remain at Holkham but many of the manuscripts are missing. The abridgements of the Year Books (Nos. 389, 390, 392) are at Holkham.

10. Nos. 394 and 396. They are at Holkham.

Theoloall, Lambard, Fitzherbert, Perkins, Crompton, William Rastell, etc.¹¹ There are, moreover, many bound volumes of miscellaneous legal manuscripts. Some bear merely the tantalizing title of "judicial records." Others are reports of single cases, cartularies, statutes, forest laws, laws of the Anglo-Saxons, reports of Irish cases, cases in the High Commission and matters relating to prohibitions. These are but some of the more obvious items.

The legal manuscripts are particularly interesting.¹² One can see how they formed a vital part of Coke's working legal library. Thus he lists "foure bookes of the Collection of cases by the lord Dier in fol: whereof two are written with his owne proper hand;"¹³ and elsewhere he remarks that a certain case is "not in the printed book [of Dyer's reports] but in his other book, a manuscript with his own hand, which book I have, in which there are many cases not in the printed book."¹⁴ Coke possesses other reports in manuscript by Thurston, by Sir John Spelman, grandfather of the antiquary, and by William Bendlowes, now, alas, not to be found at Holkham.¹⁵ Professor Thorne is disappointed to find¹⁶ that Coke's many references in the Institutes to the *coram rege* rolls may be traced, not to the rolls themselves, but (1) to abstracts by Arthur Agard and (2) to a 14th century transcript of cases in the King's Bench, both of which appear in the catalogue and remain at Holkham.¹⁷ But at least Coke sought access to this material and used it to supplement Year Books and reports. In somewhat the same way he supplemented Statutes by the manuscript rolls and records of parliament and by other manuscripts in his catalogue. In the proem to the Second Institute he says, "We in this second part of the Institutes, treating of the ancient and other statutes, have been inforced almost of necessity to cite our ancient authors, Bracton, Britton, the Mirror, Fleta, and many records, never before published in print."

Coke's catalogue offers a new approach to his writings and speeches. It illustrates the breadth of the man as well as his industry and erudition. It underlines also the crabbed and difficult nature of the materials with which he worked and the dark recesses from which he fetched out fine points of law.

DAVID HARRIS WILLSON†

11. Nos. 411, 413, 415, 373, 410, 417, 418, 428, 429. They are at Holkham except for Nos. 373, 410, and 429.

12. Coke's legal manuscripts have suffered many losses. For those that remain, see, in addition to this catalogue, A. J. Horwood, *The Manuscripts of the Right Honourable the Earl of Leicester, Holkham Hall, Norfolk* in the NINTH REPORT OF THE HISTORICAL MSS COMMISSION, Appendix ii (1884), pp. 357-75, and SEYMOUR DE RICCI, A HANDLIST OF MANUSCRIPTS IN THE LIBRARY OF THE EARL OF LEICESTER AT HOLKHAM (Bibliographical Society, 1932).

13. No. 302. They are not at Holkham.

14. P. iii, note 2.

15. Nos. 347, 328, 330, 349.

16. P. vii-viii.

17. Nos. 316, 317, 312.

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THE AMERICAN CIGARETTE INDUSTRY, By Richard B. Tennant. Yale University Press, 1950. Pp. xxvi, 411. \$5.00.

IN at least one sense economists follow the law—they write books on industries whose records are divulged in antitrust proceedings. The recent *American Tobacco* case has thus informed Professor Tennant, and in turn he here informs us, in a useful and well-written study of the cigarette industry.

Tennant treats of every important aspect of the American cigarette industry: consumption; structure of production and marketing; pricing; tobacco farming and marketing; advertising; and profits. Sketches of the historical developments in these areas usually preface more detailed analyses of their present workings.

His broad interpretation of the industry is that it is almost a textbook example of tacitly collusive oligopoly, based chiefly upon economies in selling (especially advertising). Prices are limited by the relative ease of entry of new firms whose unadvertised products will find ready acceptance if the prices of standard brands get very high. Price competition among the Big Three is negligible, and sales are divided by competitive selling efforts. There has been hardly any overt collusion, and little need for it. This general interpretation seems wholly sound. The detailed analysis is also usually judicious: Tennant is not out to convict or acquit the Big Three of every charge.

Yet, partly perhaps because of the vast scope of the study, it has a certain haziness and flashes of impetuous dogmatism. I shall give three examples. The first is Tennant's belief that price stability is dictated by the fact that price reductions will be followed quickly by rivals but that price increases will not be followed (p. 281). The empirical basis for this belief is that since 1928, when price uniformity was established among the Big Three, one of 10 attempted price increases was not followed by the rivals. This seems a rather thin statistical basis for his belief. A second example is his interpretation of market sharing in buying tobacco leaf as competitive behavior (p. 330). Market-sharing is strictly collusive, and makes the supply curve of each firm have the same elasticity as the market supply.

Finally, Tennant leaps impatiently to the conclusions: "The present concentrated market structure yields better market results than would any alternative with the possible exception of full monopoly. . . ." (p. 385). (It seems less than consistent to approve of the 1911 dissolution in the same paragraph.) His fears of excessive advertising and quality deterioration if there were more firms in the industry are not supported by evidence of their appearance in competitive industries; his objection to business failures shows no recognition of their functions; his argument that "with a few more firms, oligopoly relationships would persist" is dubious con-

jecture. The cigarette industry is unusual chiefly in that dissolution would have involved an attack on brand names, a fearful struggle the antitrust division was probably wise in avoiding.

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